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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 953

THE SANITARY DISTRICT OF CHICAGO,
Petitioner,

vs.

ACTIVATED SLUDGE, INC., ACTIVATED SLUDGE, LTD., EDGAR C. GUTHARD, CARL W. JOHNSON, ALBIN C. AHLBERG, ARTHUR D. BRADBURY, CLIFFORD C. BRADBURY, CLIFFORD C. BRADBURY as Assignee of DOROTHY F. BRADBURY, Deceased, WILBURN F. BRADBURY, EVA B. CAMP, CLAIRE M. FAIRBANKS as Assignee of ARTHUR B. FAIRBANKS, Deceased, SAMUEL B. FLEAGER, FRANCES F. JOHNSON, NINA JOHNSON, ALBERT G. McCALEB, RUTH F. McCALEB, FRANKLIN MAYO, GERTRUDE A. REINKE, PATRICIA M. WILLIAMS and LYNN A. WILLIAMS, JR.,
Respondents.

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Foreword.

Aside from its unseemly invective, respondents' brief is based on the argument that certiorari should not be granted for the reason that the case is old, the record is long, and only factual issues are raised.

Before the final decree in any patent case is entered and affirmed by the Court of Appeals, many years must perforce elapse. All patent cases involve two separate trials and usually two separate appeals. With their judgment against a solvent municipal corporation earning 5 per cent interest, respondents are not concerned with the delay which will result should this Court grant certiorari; they are concerned only with the value of their judgment once this Court directs its critical eye towards the proceedings below. Desirable as it is to bring litigation to an end, we have always believed that the primary objective of the courts is to do justice.

If it were not the practice of this Court to take jurisdiction of cases with long records, some of its most famous decisions would not have been rendered. However, the points raised in our petition require reference only to a small portion of the record.

Despite respondents' unsupported charges to the contrary, the points we urge are legal and will not require the Court to resolve factual issues. Respondents seek refuge in the long record by making vague reference to its thousands of pages but not to any specific pages, in an effort to make it appear that there are numerous issues of fact raised in our petition. Our petition makes it clear that we have avoided controversial issues of fact.

Another point made by respondents is that the patents in suit have expired. That argument did not prevent this Court from reviewing many cases such as *Marconi Wireless Tel. Co.* v. *U. S.*, 320 U. S. 1, 4, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 401, and *Electric Cable Joint Co.* v. *Brooklyn Edison Co.*, 292 U. S. 69, in which the patents involved had likewise expired.

Despite their repeated references to petitions for writs of certiorari previously filed in this case and in the *Milwaukee* case, respondents do not deny that this Court rarely grants certiorari from interlocutory orders. The fact that petitioner attempted to bring this case to an earlier conclusion by seeking premature review by this Court of the proceedings below should not prejudice the present petition (*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418).

Throughout their brief respondents quote the opinions below to support their contentions, apparently overlooking the fact that the legal errors underlying those opinions form the basis of our petition for writ of certiorari. Respondents ignore the important conflicts between the opinions below and those of this Court and of other circuits.

If, after reading the answer made by respondents to each point in our brief, reference is made to the same point as argued in our brief, it becomes apparent that respondents have not come to grips with us but have gone off to more secure and distant fields of encounter. The extent to which our points remain unanswered will be manifest from the analysis which follows:

Point I.

Respondents make no attempt to justify one of the objects of their unconscionable conduct in the formation and execution of a conspiracy to suppress Dilling's relation to this case, namely, their intended use of him as an expert witness in this case.

Respondents would create the impression that the factual issues raised in our petitions concerning Dilling's relation to this case have been the subject of a trial in the District Court. Although the courts below deemed it proper to read the petitions setting forth the unconscionable and inequitable conduct of respondents regarding Dilling in conjunction with the record in this case leading to the entry of the interlocutory decree, it is absurd for respondents to claim (p. 13) that "the parties had been heard upon the merits of the matters which constituted the subject matter of the petition to vacate and reopen". The District Court denied leave to file our original petition and struck paragraph 4 of the subsequent petition. Petitioner had no opportunity to introduce any evidence in support of its petitions. For the purpose of testing their sufficiency, the allegations in the petitions must be accepted as true.

The legal error of the courts below arises out of their making the findings referred to by respondents (pp. 14-23) in conflict with the allegations in the petitions sought to be filed and without granting petitioner any opportunity to take testimony and offer evidence in support thereof.

The right to introduce testimony to fully establish the fraud on the court has long been determined by this Court as a principle of equity and also by the Rules of

Civil Procedure (Rule 25). This Court in *Hazel-Atlas Glass Co.* v. *Hartford,* 322 U. S. 238, said in a footnote (p. 250):

> "We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses."

For instance, respondents' frequent reference to the earlier findings of the trial court in denying our petitions, including the finding that Dilling in effect had no connection with the adoption of the activated sludge process, is flatly contradicted by the allegations which should have been accepted as true, and by the subsequently discovered Defendants' Exhibit A-12, wherein Dilling expressly stated (R. I, 709):

> "I am the one who recommended its use in the North Side Sewage Treatment Works now being constructed here in Chicago."

In the *Hazel-Atlas* case this Court disposed of the defense of laches, now raised by respondents, as follows (p. 246):

> "Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Respondents do not deny that the courts below refused to follow the recent Supreme Court cases cited in our brief and that they interpreted them as applying only to fraud perpetrated upon the Patent Office rather than upon the courts.

In the recent case of

Marr v. *A. B. Dick Co.*, 91 L. ed. 73 (decided November 12, 1946),

when the charge of fraud in the suppression of evidence by the patentee almost 20 years earlier was made, not by the defendant but by the Solicitor General as *amicus curiae,* this Court did not wave the charge aside even though the basis of the charge was no more than an unproved indictment. This Court did what it should do here—it granted the petition for writ of certiorari, vacated the judgment of the Circuit Court of Appeals and required consideration of the question raised by the Solicitor General as to "whether respondent's prosecution of the instant case may not constitute a fraud upon the courts". The ground for the Solicitor General's urging this Court to grant certiorari is succinctly stated in his *amicus curiae* memorandum as follows:

> "This Court may wish to have an inquiry made to determine the truth of the facts alleged in the Government's anti-trust proceedings before final disposition of this case, in view of the public interest in safeguarding the integrity of the judicial process and in not permitting misuse of the public grant which a patent represents."

In the *Marr* case the Solicitor General's memorandum is based upon the same proposition as Point I of our petition for certiorari, namely, that the respondents suppressed and withheld facts which, had they been available, might have defeated this suit.

Point II-A.

Respondents do not deny that the concept of "extra damages" conjured by the courts below is without precedent, is unsound in theory and will cause untold confusion in the law of damages in patent cases.

The cases cited by respondents (p. 25) are those in which exemplary or punitive damages were allowed—which, it is conceded, cannot be done against a municipal corporation such as petitioner.

Respondents confuse the elusive elements considered by the court in determining the reasonable royalty—which are specified in some detail by the court but without placing any dollar value on them—with the "extra damages" described by the court as "elusive"—which remain undefined.

Point II-B.

As to the adequacy of the findings of fact, we defy anyone to determine from them the basis for the judgment of $950,000. There are no findings "of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated" (*Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 420).

Point II-C.

Respondents do not and cannot point to any specific, competent evidence to support the judgment. The uncontroverted, tangible evidence introduced by petitioner is ignored—as it was by the courts below.

Point III.

That it has taken so long for a case involving the patents in suit to reach a final decree may reflect upon respondents' dilatory tactics and the judicial process but does not demonstrate, as respondents argue, that the patents are valid.

Respondents charge that we knowingly mislead the Court when we state that the patents in suit have not been considered anywhere but in the Seventh Circuit, but they do not cite a single case elsewhere which decided the validity of the patents on their merits. The case against Waco, Texas, was settled by a consent decree. The only cases in the Seventh Circuit were against Milwaukee (the *Fehr* case was against the contractors who built the Milwaukee plant, also in the Eastern District of Wisconsin) and petitioner. Who has been guilty of "false statement"?

Point III-A.

Respondents intimate that the courts below considered *Corona* v. *Dovan,* 276 U. S. 358, but the lengthy opinions below fail to mention it, and if the courts below had not ignored its principles they would have held that Jones was not the inventor of the activated sludge process.

Respondents make no comments about the repeated admissions by Jones that he was not the inventor of the bio-chemical process described in the process patents. They likewise are unable to explain away the statements in the opinions below that the bio-chemical process was discovered by Fowler, Ardern and Lockett.

The only point emphasized by respondents is that Jones later employed the scientists to perfect apparatus to practice the bio-chemical process but that point becomes important only if reduction to commercial success is necessary for invention—as the courts below erroneously held.

Point III-B.

In regard to the collective consideration of the patents by the courts below in order to sustain their validity, we are not obliged to guess the thought processes of the courts below—as charged by respondents—but need look only to their written opinions.

No matter how respondents may endeavor to give them some other interpretation, the opinions below clearly state that the patents were considered collectively.

Point III-C.

The last point, concerning the sufficiency of the claims in the apparatus patent to describe the invention, if any, although appearing last in the sequence of our argument, is of great importance and general interest and, judging from respondents' answer, strikes a lethal blow at their right to recover.

Respondents apparently deny that the "means" referred to in the apparatus claims constitute invention but fail to state wherein the invention lies. If invention cannot be found in the means, there is nothing else in the claims smacking of invention. The ridicule and diatribe directed at our argument by respondents cannot substitute for a description of the invention in the claims.

Respondents erroneously assert that our argument is based on a controverted factual issue relating to whether or not the patents in suit are predicated on certain British patents. We referred to the first British patent only to point out that Jones described and claimed specific apparatus in his British application but that in his United States application he deliberately chose to describe, and obtained a patent on, broad claims which, we submit, are invalid on their face. Of course, in order to comprehend this proposition, the Court need only read the first British patent and it would be obviously pointless to go into the "factual controversies" alluded to by respondents (pp. 50-52).

Nowhere do respondents show where any invention is described in the claims.

Respondents do not deny that serious confusion exists in patent law in regard to the relationship between the claims and the other parts of a patent and that such confusion should be settled by this Court.

Conclusion.

This is really three cases in one: the validity of the patents, the assessment of damages and the conduct involving the suppression of evidence concerning Dilling's relationship to this case. Yet the issues involved are relatively simple and any one of them should be sufficient to warrant this Court in issuing its writ of certiorari.

Respectfully submitted,

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